IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 22 OF 2007

1. Maria de Jesas Marcela Joao,
daughter of Gonsalo Joao (expired), widow.

2. Joaquim Sergio Dias,
son of Antonio Lourenco Dias

3. Benzanim Pedro Joao Dias,
son of Antonio Lourenco Dias

4. Jose Antonio Casmiro Joao Dias,
son of Antonio Lourenco Dias

5. Simao Tadeu Joao Dias,
son of Antonio Lourenco Dias

6. Mario Aires Micael Dias,
son of Antonio Lourenco Dias

7. Auta Genoveva Joao,
daughter of Gonsalo Joao,
widow (expired) represented through
legal heir at Sr. No.8.

8. Francisco Fernandes,
son of Manual Francisco Fernandes

9. Lourdes Joao,
daughter of Gonsalo Joao, widow

10. Pedro Ribeiro,
son of Crisologo Nazario Alexander Ribeiro

11. Valente Nazario Ribeiro,
son of Crisologo Nazario Alexander Ribeiro

12. Joao Francisco Prisca Rebeiro,
son of Crisologo Nazario Alexander Ribeiro

13. Marcelino Ribeiro,
son of Crisologo Nazario Alexander Ribeiro

14. Felecidade Joao,
daughter of Gonsalo Joao, married,
and her husband (expired) represented
through legal heirs,

1a. Augusta Fernandes

1b. Minguel Antonio Pires

2a. Catarina Fernandes

2b. Livio Antonio Fernandes

3a. Anita Fernandes

4. Rita Fernandes

5. Lina Fernandes

6. Domingos Fernandes

All major in age, r/o Portal Waddo,
Santan, Talaulim, Ilhas, Goa.

The Appellants Nos. 1 to 7 and 9 to 14
are represented herein by their attorney
the Appellant No.8.

15. Joao Inacio Fernandes,
son of Augusto Fernandes,
r/o Merces, Ilhas, Goa,
represented by his attorney
the Appellant No.8. .... Appellants

V/s

1. Maria Francisco Angelica Nazareth
(since deceased) through legal heirs

2. Martha Albertian Joao,
daughter of Gonsalo Joao,
married and her husband

3. Joaquim Pires,

both of full age,
residing at Carmichem Bhat,
Merces, Ilhas, Goa.

4. Alberto Francisco Joao,
son of Gonsalo Joao and his wife

5. Regina Moraes,
both of full age,
residing at Kumarwada,
Merces, Ilhas, Goa.

6. M/s. Adarsha Accumulators,
a Partnership firm, having its office at Merces,
Ilhas, Goa, represented by its partner
Ramchandra Vassudev Nayak,
major, son of Vassudev Nayak,
r/o St. Caitano, Merces, Goa.

7. Constantinao D'Souza

8. Albertian Joao,
daughter of Gonsalo Joao

Both r/o Carmichembhat, Merces, Goa. .... Respondents

Mr. P. Rao, Advocate for the Appellants.
Mr. S.D. Lotlikar, Senior Advocate with Mr. P. Lotlikar, Advocate for Respondents No. 2 to 5.

CORAM : N.A. BRITTO, J.

DATE : 29th NOVEMBER, 2007

ORAL ORDER :

Heard Shri Rao, the learned Counsel of the appellants and Shri Lotlikar, the learned Senior Counsel of the Respondents.

2. This is plaintiffs' Second Appeal against the dismissal of the suit filed

by the plaintiffs, by judgment and decree of trial Court dated 24/01/2003 which has been upheld by the first appellate Court by judgment dated 18/08/2006.

3. The plaintiffs had filed the said civil suit to set aside four sale deeds namely dated 8/11/1957, 13/06/1961, 31/10/1964 and 22/05/1965 executed by plaintiff no. 1, plaintiff no. 7, plaintiff no. 9 and plaintiff no. 14 on the ground that the same were executed by practicing fraud upon the plaintiffs by their stepmother/aunt i.e. defendant no. 1 (since deceased). The fraud was based on the allegation that the said sale deeds were executed by representing that they had to execute certain documents pertaining to their marriage.

4. There is no dispute that the mother of the said plaintiffs by name Albertina had purchased the suit property in the year 1947. The said Albertina was married to Gonsalo Joao. Albertina died on 8/10/1947. Inventory proceedings took place upon her death, as a result of which 50% of the share came to be alloted to Gonsalo Joao, the father of the said plaintiffs and 50% to the said daughters of Gonsalo Joao and Albertina, namely the aforesaid plaintiffs. The said Gonsalo Joao married defendant no.1 on or about 28/04/1948 who was the aunt of the said plaintiffs.

5. The suit was filed on 26/09/1994 for setting aside the said sale deeds

and as rightly observed by the learned first appellate Court more then 29 years later, after the last sale deed dated 22/05/1965. It appears that plaintiff no.1 got married subsequently on 9/11/1957, plaintiff no.7 on 17/01/1961 and plaintiff no.9 on 7/11/1964 and yet the said sale deeds were executed by the said plaintiffs along with their respective husbands. However, the fact remains that plaintiff no.14 was married on 11/05/1965 i.e. prior to the execution of the sale deed dated 22/05/1965.

6. It is quite probable that since the said plaintiffs, namely, plaintiff no.1, 7 and 9 were engaged to marry that their spouses to be were shown as their husbands and were made parties to the said sale deeds. However, the fact remains, that none of the said plaintiffs stepped into the witness box to support their claim that the execution of the said sale deeds was fraudulently obtained by their stepmother and aunt, the said defendant no.1. The learned first appellate Court has observed that the recording of evidence had commenced on 12/09/1997, at the time when plaintiffs no. 9 and 14 were living and since the alleged representation and fraud was within their personal knowledge only they could have deposed about the same but the said plaintiffs no. 9 and 14 did not step into the witness box. In fact an adverse inference ought to have been drawn against plaintiffs for non-examination of plaintiffs no. 9 and 14 in support of the case pleaded by them. Parties are expected to place before the Court the best available evidence.

Plaintiffs had examined one Francisco as PW1 who was the son of one of the said plaintiffs. Joao Ribeiro/PW2 who was the son of another plaintiff. The learned first appellate court referred to the evidence of the said two witnesses. Obviously, they did not have any first hand knowledge of the misrepresentation or fraud practiced upon the said plaintiffs by their stepmother/defendant no.1. The learned first appellate Court then concluded, and, in my view rightly, that their evidence was hearsay. Needless to note they were born much later after the execution of the said sale deeds. The learned first appellate Court had also taken note as to when the sale deeds were executed and the lapse of time after which the suit was filed.

7. Both the Courts below have come to the conclusion that the sale deeds were not the result of fraud, and, the first appellate Court has concluded that the said plaintiffs and their respective spouses were fully aware of what they had executed were the sale deeds and not documents concerning their marriage. In fact it is not the case of the said plaintiffs at any time that any one of them were illiterate. The learned first appellate Court has also observed that the suit was filed more than twenty nine years after the execution of the last sale deed and that under Article 56 and 58 of the Limitation Act, a suit for declaration had to be filed within three years from the date of the execution of the document or at least knowledge of fraud and since the plaintiffs had failed to prove any fraud in execution of the said sale

deeds, a suit which was belatedly filed for the cancellation of the said sale deeds had to be dismissed as barred by limitation. The learned first appellate Court also noted, and, in my view rightly, that the plaintiffs have not pleaded as to when they came to know about the execution of the sale deeds. The contention of the learned Counsel on behalf of the plaintiffs that there is no application of mind or perversity on the part of the learned first appellate Court cannot be accepted though there might have been some wrong observations as to the dates of marriages of the said plaintiffs no.1, 7 & 9. Both the Courts below, considering the evidence produced by the plaintiffs have rendered concurrent findings that the plaintiffs failed to prove the plea of fraud and as such no interference is called from this Court.

8. Second Appeal therefore is hereby rejected with costs to be paid by the plaintiffs to the defendants, throughout.

N.A. BRITTO, J.

NH/-